IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 30 OF 1997

Shrinivas Vishwambar Dessai,
aged about 47 years,
agriculturist, residing at
Pale, Ambegal,
Bicholim-Goa. ... Appellant

versus

1. Yeshwant Vishnu Gaudo,
aged about 47 years,
agriculturist, residing
at Pale, Ambegal,
Bicholim-Goa.

2. Nanda Shivlo Gaudo
(since deceased) by
Legal Representatives:

(a) Mrs. Manda alias
Mangal Nanda Gaudo,
major, housewife,
residing at Pale,
Ambeshi, Taluka
Bicholim, Goa.

(b) Mr. Kishore Nanda Gaudo,
13 years of age,
residing at Pale,
Ambeshi, Taluka Bicholim,
Goa.

(c) Miss Kiran Nanda Gaudo,
15 years of age,
residing at Pale,
Ambeshi, Taluka Bicholim,
Goa.

(b) and (c) being minors
represented by their
guardian Mrs. Manda alias
Mangal Nanda Gaudo. ... Respondents.

Mr. R. G. Ramani, Advocate for the Appellant.

Mr. Sudin Usgaonkar, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 10TH SEPTEMBER, 2004.

ORAL JUDGMENT

This is Plaintiff's second appeal, arising from Regular Civil Suit No.20 of 1984.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The dispute between the Plaintiff and the Defendants is regarding property surveyed under No.71/1.

4. Briefly stated, the case of the Plaintiff was that the said property belonged to Balchandra Fotu Sinai Kenkre and the same was in his possession and enjoyment of the family of the Plaintiff since more than 100 years and it is the family of the Plaintiff who had cultivated and developed the said property. The Plaintiff claimed that he was a tenant of the said property and that in the said survey, the name of his father was shown as a tenant but later on, that entry was deleted and Plaintiff's father was shown as a care-taker and, therefore, he filed an application dated 8th April, 1981 to the Mamlatdar of Record of Rights requesting to enter his name as a tenant.

5. The Plaintiff stated that in May, 1978, mining rejects from the mine of M/s. Rajaram Bandekar were collected in the suit property and the father of the Plaintiff had filed an application to the Mamlatdar praying for compensation of Rs.3000/- in respect to the dumping of the said mining rejects but the case was then compromised and the Plaintiff's father was paid compensation of Rs.2,500/-. The Plaintiff had stated that the said property was a garden land having areca and coconut trees, jackfruit trees, banana plantation etc. and that he used to get a yield of 5 quintals of areca nuts, 800 coconuts and 150 jackfruits per year and that the yield also depended upon seasonal changes.

6. The Plaintiff stated that in the month of January, 1984, the Plaintiff plucked about 50 kilos of areca nuts and then in February about 5 kgs. through Yeshwant Gaudo and that in the first week of February, 1984, the Plaintiff dug about 125 pits for the purpose of banana plantation. The Plaintiff stated that on 16th February, 1984, the Plaintiff plucked about 200 coconuts but on the same day in the evening when the Plaintiff's labourer, the said Yeshwant Gaudo was working in the suit property, as usual and was removing betel leaves, Defendant Nos.2 and 3 shouted at him and threatened him and then caught hold of him and tied to an areca nut tree and that immediately

thereafter the wife of the Plaintiff lodged a Police complaint pursuant to which Defendant Nos.1 and 2 were arrested. The Plaintiff further stated that on 19th February, 1984, the Defendant No.1 tried to interfere and threatened the Plaintiff that he would be killed and thereafter the Plaintiff lodged another complaint. The Plaintiff stated that on 22nd February, 1984, the Plaintiff did the work of banana plantation. The Plaintiff stated that the cause of action arose on or about 19th February, 1984 and he filed the said suit praying for injunction to restrain the Defendants from obstructing the Plaintiff and his family members in doing the work in the suit property. Thereafter, the Plaintiff amended the suit on or about 5th October, 1985 and stated that as the Defendants had no right to the suit property, the Plaintiff was entitled for restoration of possession of the property. However, the Plaintiff did not include a prayer for restoration of the said possession.

7. The Defendants contested the suit and stated that the suit property was part of their property known as "Xiachem Tollem" and the same was owned and possessed by Defendant No.1 and others and the same consisted of cashew trees, areca nut trees, coconut trees, jackfruit trees, etc. The Defendants stated that they along with other co-owners have constructed a

stone fencing. The Defendants denied that the Plaintiff was a tenant or that he paid any rent to the said Balchandra Kenkre. The Defendants also denied that the suit property was in possession and enjoyment of the family of the Plaintiff. The Defendants stated that the suit property was never in possession either with the Plaintiff or with his family but on the other hand, the suit property was cultivated by the Defendants and enjoyed by them and their ancestors. The Defendants stated that the name of the father of the Plaintiff was recorded wrongly as a care-taker in the survey records and that the Plaintiff was neither a tenant nor a care-taker of the said property and that the Defendants had applied to the Mamlatdar to delete their names but so far, no decision was taken. The Defendants stated that there was a suit between the said Balchandra Kenkre, the Defendants and others in respect of the said property known as "Xiachem Tollem" which included the suit property and the same was decided in favour of Defendant No.1 and others about 22 years back.

8. The Defendants stated that they were not aware of any application having been made by the father of the Plaintiff to the Mamlatdar as they were not parties to the same and if, at all there was one made, the same must have been made to fabricate and

manipulate evidence against the Defendants. The Defendants also stated that the mining rejects had entered into survey no.69/1 and the father of the Plaintiff falsely showed them in the survey no.71/1. The Defendants also stated that the said mining rejects also entered in the cashew part of the property known as "Xiachem Tollem" and for which the Defendants received compensation. The Defendants also stated that the part of the property "Xiachem Tollem"(hilly side) has been sold to M/s. Rajaram Bandekar and prior to that to M/s. Salitho Ores Pvt. Ltd. The Defendants stated that the Plaintiff did not do any plucking as stated by him and that the same was being regularly done by the Defendants and others. The Defendants stated that the Plaintiff enjoys the property surveyed under No.69/1 which is also close to the property "Xiachem Tollem". The Defendants stated that they have all the rights of ownership and possession as regards the suit property. The Defendants denied that the Plaintiff was entitled to the restoration of possession.

9. The learned Civil Judge, Senior Division, Bicholim, by Judgment/Decree dated 29th February, 1992, decreed the suit of the Plaintiff with costs.

10. The Defendants having filed an appeal against the same, the learned Additional District Judge, Mapusa, by his Judgment/Decree dated 30th September, 1996, allowed the said appeal and set aside the Judgment/Decree of the learned trial Court.

11. Hence, this appeal. This appeal was admitted on two substantial questions of law, namely:-

(A) Whether the Appellate Court had jurisdiction to dismiss the suit filed by the appellant claiming to be the tenant of the suit property which is admittedly an agricultural property without getting the decision of the competent authority, i.e. the Mamlatdar on the issue of tenancy?

(B) Whether the Appellate Court has exercised appellate jurisdiction illegally by substituting its opinion on findings of facts given by the Trial Court without recording finding that the findings given by the Trial Court were totally perverse?

12. In support of the said questions namely that the said questions are substantial questions of law, Mr. R. G. Ramani, learned Counsel of the Appellant

has placed reliance on the case of **Santosh Hazari** v. **Purushottam Tiwari**((2001) 3 SCC 179. On the other hand, Mr. Sudin Usgaonkar, learned Counsel of the Respondents has placed reliance on the case of **Kondiba Dagadu Kadam** v. **Savitribai Sopan Gujar and others**(AIR 1999 SC 2213).

13. The Supreme Court in the case of **Kondiba Dagadu Kadam** v. **Savitribai Sopan Gujar and others**(supra) has stated that if the question of law termed as substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its mere wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate Court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate

Court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law, or of procedure requiring interference in second appeal.

14. In the case of **Santosh Hazari** v. **Purushottam Tiwari**(supra) the Supreme Court has stated that the phrase "substantial question of law" as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction to – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. The Supreme Court has further held that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or

a binding precedent, and must have a material hearing on the decision of the case, if answered either way insofar as the rights of the parties before it are concerned. To be a question of law "involved in a case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.(Emphasis supplied)

15. There can be no dispute that by virtue of sub-section 5 of Section 100 of the Code of Civil Procedure, the Respondents(Defendants) herein are entitled to argue that the case does not involve such question.

16. As far as the first question is concerned, there is no doubt that it is a new point of law which is raised for the first time before this Court. It is to be noted that it is the Plaintiff who himself invoked the jurisdiction of the learned Civil Judge, Senior Division, by filing the suit before him. After having submitted to the jurisdiction and obtained a Judgment in his favour, it does not lie in the mouth of the Plaintiff to say that his case ought to have been referred to the Mamlatdar because he was a tenant. The Plaintiff had approached the Court of the Civil Judge, Senior Division claiming to be a tenant in possession and in case, it was proved that the Plaintiff was a tenant in possession, the learned Civil Judge, Senior Division would be competent to grant an injunction in his favour.

17. It has been stated in the case of **Tikaram and Sons Ltd.** v. **The Commissioner of Sales Tax**(AIR 1968 SC 1286) that "the Appellant had voluntarily submitted to the jurisdiction of the revisional authority and of the High Court on the matter in issue and having submitted to the jurisdiction and having taken the chance of Judgment in his favour, it is not right that the Appellants should take exception to the jurisdiction of the High Court when the Judgment has gone against it.

18. That apart, the Plaintiff has now admitted in his evidence that his application for declaration of tenancy has been dismissed.

19. As regards the second question, Mr. Ramani, learned Counsel has placed reliance on the case of **Manjunath Anandappa** v. **Tammanasa and others**((2003) 10 SCC 390) and has submitted that the learned first appellate Court was not at all justified in interfering with the discretion exercised by the learned trial Court in decreeing the suit. In the case of **Manjunath Anandappa** v. **Tammanasa and others**(supra) the Supreme Court has stated that it is now well settled that a court of appeal should not ordinarily interfere with the discretion exercised by the courts below. The Supreme Court further observed that if the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

20. In my view, there can be no quarrel with the law laid down by the Supreme Court in the case of **Manjunath Anandappa** v. **Tammanasa and others**(supra) that when a trial Court in exercise of its discretion decides a matter, that discretion unless it is shown to

be arbitrary or perverse, cannot be interfered with by the appellate Court. It could be interfered with if it is shown that the trial Court has ignored the settled principles of law regulating the grant of discretionary reliefs.

21. However, the second question as formulated and on which the appeal was admitted cannot be a substantial question of law. At the most, it may be a question of law. It is true that the learned first appellate Court has given no finding that the findings given by the learned trial Court were arbitrary or capricious or perverse or against the settled principles of law relating to the grant of discretionary reliefs like injunction but the fact remains that the learned trial Court has assessed the evidence entirely and has come to its own conclusions that the Plaintiff was not entitled to the reliefs sought. Being so there is no substantial question of law to be entertained in this second appeal.

22. However, the matter may not be allowed to end there. As already stated, the Plaintiff had filed the suit for injunction simpliciter and later on had only pleaded that the Plaintiff was entitled for restoration of possession without seeking any prayer for recovery of possession of the suit property. The Plaintiff did

not value his suit for recovery of possession nor paid Court Fees on the same. This controversy was raised before the learned first appellate Court but has not been considered by it.

23. It is the submission of Mr. Ramani, learned Counsel that in case time is given, the Plaintiff would be willing to pay the Court Fees. In my view, such a liberty cannot be extended in favour of the Plaintiff in this second appeal. It was the duty of the Plaintiff not only to have included a prayer of recovery of possession but also to have paid adequate Court Fees on the same. Having not done the same, the learned Civil Judge, Senior Division, was certainly not justified in decreeing the suit for the recovery of possession of the suit property.

24. The Plaintiff had claimed tenancy in respect of the suit property in relation to Balchandra Kenkre. However, the Plaintiff had not examined him in support of his claim. The Plaintiff had also not examined Yeshwant Gaudo, who was claimed to be a labourer of the Plaintiff. The Plaintiff produced several documents. The Plaintiff had failed to prove the letter dated 9th February, 1958, alleged to have been addressed by the said Balchandra Kenkre to the father of the Plaintiff. Form No.3 produced by the Plaintiff does not show that

the name of the father of the Plaintiff was ever deleted as otherwise was claimed by the Plaintiff. The name of the Plaintiff appears to have been recorded in the other Rights column. In case, the name of the Plaintiff was really deleted from the tenant's column, the Plaintiff would have stated so in his application dated 8th April, 1981 to the Mamlatdar, Record of Rights. As far as Form No.3 is concerned, the name of the Plaintiff's father is only shown to be a care-taker/Rakhandar and being so, the same would not even prima facie support the claim of possession of the Plaintiff. The Plaintiff produced another letter dated 1st March, 1979 but this letter again has not been proved by the Plaintiff by examining anyone from M/s. Bandekar & Co. The Plaintiff produced the Judgment in Civil Suit No.34/F/84 but the said Judgment does not refer to any property as such and it is otherwise an admitted position that the Plaintiff as well as the Defendants do have properties close to one another. The Plaintiff did not examine any witnesses from the locality. P.W.2, Pandurang Batgaonkar, was not only a nephew of the Plaintiff but was residing at a distance of about 20 kms. P.W.3, Bhaskar Dalvi, was again a resident of Ponda and likewise, P.W.4, Mahadev Dessai, was a resident of St. Cruz. Primarily, it was for the Plaintiff's burden to prove that he was in possession of the suit property and that he was dispossessed

because otherwise it was admitted that the Defendants were in possession of the suit property. The claim of the Plaintiff has been so vague that the Plaintiff did not even satisfy as to when exactly the tenancy was created or what is the type of rent the Plaintiff or his ancestors have been paying to the said Balchandra Kenkre. Plaintiff's claim for tenancy was also dismissed by the Mamlatdar. It is very easy for anyone to come forward and say that rent is being paid in respect of any particular property. P.W.2, Pandurang Batgaonkar, blankly stated that the Plaintiff was dispossessed in the year 1984 and so is the case with P.W.3, Bhaskar Dalvi, who claims that some relatives of the Plaintiff had told him that the Plaintiff was dispossessed in the year 1984. P.W.2, Pandurang Batgaonkar, conceded that he did not know how much rent was paid by the Plaintiff to the said Kenkre. P.W.3, Bhaskar Dalvi, in one breath stated that presently, Bandekar & Company are the owners of the suit property and in another breath stated that the Plaintiff is the tenant of the suit property. P.W.3, appeared to be more pro-Plaintiff than the Plaintiff himself, in that, he began giving his evidence by giving the history of the origin of the suit property. He claimed that he was a Police Patil, when otherwise, it is common knowledge that there were no Police Patil during the Portuguese regime. P.W.4, Mahadev Dessai, claimed to

be a Mukadam which fact is difficult to be accepted. In case, the Plaintiff was the tenant of the suit property belonging to the said Kenkres it does not stand to reason that the said Kenkres would engage the services of a Mukadam. As rightly observed by the learned first appellate Court, the evidence of the witnesses examined by the Plaintiff did not inspire confidence and, therefore, the same could not have been accepted by the learned trial Court in support of the claim of possession of the Plaintiff.

25. In the light of what has been stated herein above, I find there is no merit in the second appeal and, therefore, the same is hereby dismissed. Considering the facts, there shall be no order as to costs.

N. A. BRITTO, J.

RD.